A

GOLDEN VALE GOLF RANGE & COUNTRY CLUB SDN BHD

v.

B

HONG HUAT ENTERPRISE SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HELILIAH MOHD YUSOF JCA
AHMAD MAAROP JCA

C [CIVIL APPEAL NOS: M-02-153-2005 & M-02-154-2005]
9 MAY 2008

LAND LAW: *Sale of land - Specific performance - Res judicata - Whether remedy of specific performance available - Construction of clauses*

D *- Privity to contract - Whether trial judge misdirected himself*

CONTRACT: *Sale and purchase of land - Specific performance - Res judicata - Whether remedy of specific performance available - Construction of clauses - Privity to contract - Whether trial judge misdirected himself*

E ***COMPANY LAW:*** *Separate legal entity - Lifting the veil of incorporation - Evasion of contractual obligations - Whether corporate veil ought to be pierced*

These were two appeals from the same civil suit tried in the High
F Court (the parties were referred to as in the court below); the first appeal was by the plaintiff while the second appeal was by the second third party, one Madam Chun. A company called Airport Auto Centre Sdn Bhd ('Airport Auto'), the first third party, as beneficial owner, entered into an agreement dated 10 June 1993
G ('said agreement') with the defendant to sell an undivided share in a piece of land ('subject property'). Madam Chun later caused the subject property to be transferred to the plaintiff. Later still, the plaintiff brought an action against the defendant to recover vacant possession of the subject property and consequential relief. The
H defendant counterclaimed, seeking specific performance against the plaintiff, an order against Madam Chun that she cause the plaintiff to specially transfer to the defendant the undivided share in the subject property and damages for breach of contract against Airport Auto. The judge dismissed the plaintiff's claim and entered
I judgment on the counterclaim against both the plaintiff and Madam Chun. The three grounds in support of these appeals were as follows: (i) that the counterclaim was barred by *res judicata*.

This was because of an earlier case in which the defendant applied for an interlocutory injunction against another company, which application the judge in that case dismissed; (ii) that the remedy of specific performance was not available to the defendant for the following reasons. Firstly, by reason of cl. 5 of the said agreement, the defendant had opted for monetary compensation *in lieu* of specific performance. Secondly, the plaintiff was never a party or privy to the said agreement, and one could not enforce an agreement against a non-party; and (iii) that the judge had erred in not undertaking a judicial appreciation of the evidence led before him, in consequence of which he misdirected himself.

Held (dismissing both the appeals)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) On the facts, the decision of this court in the earlier case did not necessarily and with precision determine the points at issue in the present appeal, which were: (a) whether the said agreement was a true sale and purchase agreement or a guarantee or security agreement to recover a loan made by the defendant to Airport Auto; and (b) whether Airport Auto had repaid the sum of RM282,000 to the defendant. These issues were not at stake before this court in the earlier proceedings and, therefore, the plea of *res judicata* could not succeed. (para 6)

(2) Clause 5 was a stipulation that the said agreement should be void on a happening of an event which Airport Auto could by its own act or omission bring about. Hence, it could not be permitted to insist upon the clause or to compel the defendant who was blameless to insist upon it. To do so would be to permit Airport Auto to take advantage of its own wrong. Further, cl. 5 on its true construction did not amount to an abandonment by the defendant of its right to the remedy of specific performance. Indeed, there was nothing in the said agreement from which such abandonment may be inferred. As for the argument that remedy of specific performance could not be had against the plaintiff because it was not a party to the said agreement, it was without merit for two reasons. First, there was a specific finding by the judge that at all material times the plaintiff was Madam Chun's nominee and that Airport Auto was her agent. The evidence on record fairly

supported the inference that the transfer of the subject property by Madam Chun to the plaintiff was nothing more than an attempt to evade the contractual obligations that Airport Auto owed the defendant under the said agreement. The judge accordingly pierced the corporate veil of the plaintiff and Airport Auto which, following established authority, he was clearly entitled to do. Second, cls. 20 and 21 of the said agreement, on the facts, bound both Airport Auto and the plaintiff as its successor in title. (paras 8, 9, 10, 11 & 12)

(3) Upon critical examination of the judge's evaluation of the evidence, it was clear that he did not misdirect himself upon any material particular. He disbelieved, as he was entitled to do, the testimony of the witnesses called by the plaintiff and Madam Chun. In a case such as this, it was this court's duty to defer to the finding of fact made by the judge on the issues presented to him for decision. (paras 15 & 16)

Bahasa Malaysia *Translation Of Headnotes*

Ini ialah dua rayuan berpunca dari guaman sivil yang sama yang dibicara di Mahkamah Tinggi (pihak-pihak dirujuk seperti di mahkamah bawahan); rayuan pertama dibuat oleh plaintif sementara rayuan kedua dibuat oleh pihak ketiga kedua, satu Madam Chun. Sebuah syarikat yang dipanggil Airport Auto Centre Sdn Bhd ('Airport Auto'), pihak pertama ketiga, sebagai tuan punya benefisial, membuat perjanjian bertarikh 10 Jun 1993 ('perjanjian tersebut') dengan defendan untuk menjual sebahagian tanah yang tidak terbahagi ('hartanah tersebut'). Madam Chun lepas itu menyebabkan hartanah tersebut dipindahmilik kepada plaintif. Seterusnya, plaintif membawa tindakan terhadap defendan untuk mendapat kembali milikan kosong hartanah tersebut dan relif akibatnya. Defendan menuntut balas, dengan meminta pelaksanaan spesifik terhadap plaintif, perintah terhadap Madam Chun untuk membuat plaintif memindahmilik bahagian tidak terbahagi hartanah tersebut dan ganti rugi bagi kemungkiran kontrak terhadap Airport Auto. Hakim menolak tuntutan plaintif dan membuat penghakiman di dalam tuntutan balas menentang plaintif dan Madam Chun. Tiga alasan yang menyokong rayuan-rayuan ini ialah seperti berikut: (i) bahawa tuntutan balas dihalang oleh *res judicata*. Ini disebabkan oleh sebuah kes yang lebih awal di mana defendan memohon untuk mendapatkan injunksi interlokutori menentang sebuah syarikat lain, di mana permohonan tersebut ditolak oleh hakim

dalam kes itu; (ii) bahawa remedi pelaksanaan spesifik tidak terdapat pada defendan atas sebab-sebab berikut. Pertamanya, oleh kerana kl. 5 perjanjian tersebut, defendan telah memilih untuk mendapat pampasan kewangan sebagai ganti pelaksanaan spesifik. Keduanya, plaintif tidak pernah menjadi pihak atau privi kepada perjanjian tersebut, dan seseorang tidak boleh memaksa suatu pihak yang tidak terlibat; dan (iii) hakim telah khilaf apabila gagal memahami secara kehakiman keterangan yang dikemukakan dihadapannya, yang mengakibatkan beliau tersalah arah.

Diputuskan (menolak kedua-dua rayuan tersebut)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Di atas fakta, keputusan mahkmamah ini di dalam kes yang lebih awal tidak semestinya dan dengan tepatnya menentukan isu-isu di dalam rayuan terkini, iaitu: (a) sama ada perjanjian tersebut ialah suatu perjanjian jual beli yang betul atau suatu gerenti atau perjanjian sekuriti bagi mendapat kembali pinjaman yang dibuat oleh defendan kepada Airport Auto; dan (b) sama ada Airport Auto telah membayar balik jumlah RM282,000 kepada defendan. Isu-isu ini tidak dipertikaikan di hadapan mahkamah ini di dalam prosiding yang lebih awal dan, oleh itu, rayuan *res judicata* tidak dapat berjaya.

(2) Klausa 5 ialah stipulasi bahawa perjanjian tersebut akan menjadi batal apabila terjadinya suatu perkara yang disebabkan oleh Airport Auto melalui tindakan atau peninggalannya sendiri. Oleh itu, ia tidak boleh dibenarkan menegaskan klausa tersebut atau mendesak defendan yang tidak bersalah untuk menegaskannya. Untuk berbuat sedemikian ialah untuk membenarkan Airport Auto mengambil kesempatan ke atas kesalahannya sendiri. Lagipun, kl. 5 di atas pentafsiran sebenarnya tidak bermaksud pengguguran oleh defendan haknya bagi remedi pelaksanaan spesifik. Sebenarnya, tidak ada apa-apa di dalam perjanjian tersebut yang membolehkan inferens pengguguran sebegitu dibuat. Berkenaan penghujahan bahawa remedi pelaksanaan spesifik tidak boleh digunakan terhadap plaintif sebab ia bukannya pihak kepada perjanjian tersebut, ia tidak bermerit di atas dua sebab. Pertama, hakim telah membuat dapatan spesifik bahawa pada setiap masa material plaintif ialah namaan Madam Chun dan bahawa Airport Auto ialah agennya. Keterangan di dalam rekod

menyokong inferens yang pindahmilik hartanah tersebut oleh Madam Chun kepada plaintif adalah hanya percubaan untuk mengelak dari obligasi kontrak yang Airport Auto mempunyai terhadap defendan di bawah perjanjian tersebut. Hakim sewajarnya menembusi selubung korporat plaintif dan Airport Auto yang, mengikut autoriti-autoriti yang sudah mantap, beliau dengan jelas berhak buat. Kedua, kls. 20 dan 21 perjanjian tersebut, berdasarkan fakta, mengikat kedua-dua Airport Auto dan plaintif sebagai pengganti dalam hakmilik.

(3) Setelah membuat penelitian terperinci penentuan hakim terhadap keterangan, ia jelas bahawa beliau tidak tersalah arah tentang mana-mana butir-butir material. Beliau tidak mempercayai, seperti yang beliau berhak berbuat, terstimoni saksi-saksi yang dipanggil oleh plaintif dan Madam Chun. Di dalam kes sebegini, ia menjadi tugas mahkamah ini untuk menurut dapatan fakta yang dibuat oleh hakim berdasarkan isu-isu yang dikemukakan kepadanya untuk membuat keputusan.

Case(s) referred to:

Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estates Sdn Bhd [1985] 1 CLJ 255; [1985] CLJ (Rep) 370 HC ***(refd)***

Ardeshir v. Sassoon AIR [1928] Privy Council 208 ***(refd)***

Carl – Zeiss v. Rayner & Keeler [1967] 1 AC 853 ***(refd)***

Clarke v. Edinburgh & District Tramways Co [1919] SC 35 ***(refd)***

Hong Huat Enterprise Sdn Bhd v. Golden Vale Golf Range & Country Club Sdn Bhd [2001] 1 CLJ 181 CA ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprises Sdn Bhd [2005] 5 CLJ 289 HC ***(refd)***

Jones v. Lipman [1962] 1 All ER 442 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Kok Hoong v. Leong Cheong Kweng Mines Ltd [1964] MLJ 49 ***(foll)***

Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***

Tong Lee Hwa v. Lee Yoke San [1979] 1 MLJ 24 ***(refd)***

(Civil Appeal No: M-02-153-2005)

For the appellants - Firoz Hussein (Dominic J Puthucheary & Cheng Mai with him); M/s Puthucheary Firoz & Mai

For the respondent - Wong Kim Fatt (Yong Chen Lim & Wong Boon Lee with him); M/s Yong Chen Lim & Saridah

(Civil Appeal No: M-02-154-2005)

For the appellant - Ng Kong Peng (J Amardas with him); M/s KP Ng & Amardas

For the respondent - Wong Kim Fatt (Wong Boon Lee with him): M/s Yong Chen Lim & Saridah

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the Judgment of the Court.

[2] There are two appeals before us. The first is Civil Appeal No. M-02-153-2005; the second is Civil Appeal No. M-02-154-2005. Both appeals arise from the same civil suit that was tried by the High Court in Melaka. The judgment to the High Court is reported in [2005] 5 CLJ 289. The first appeal is by the plaintiff in the court below. The second appeal is by Madam Chun, the second third party in the court below. We heard arguments in these appeals on 28 and 29 April 2008 and adjourned them for delivery of judgment to today.

[3] The brief facts relevant to these appeals are as follows. On 10 June 1993, a company called Airport Auto Centre Sdn Bhd ("Airport Auto"), the first third party in the court below, as beneficial owner, entered into an agreement with the defendant in the court below (respondent before us) to sell an undivided share in a piece of land held under Lot 208 ("the subject property"). The purchase price was RM200,000. Later, on 9 December 1994, Madam Chun caused the subject property to be transferred to the plaintiff. Later still, the plaintiff brought an action against the defendant to recover vacant possession of the subject property and consequential relief. The defendant delivered a counterclaim seeking specific performance against the plaintiff, an order against Madam Chun that she cause the plaintiff to specially transfer to the defendant the undivided share in the subject property and damages for breach of contract against Airport Auto. The learned judge dismissed the plaintiff's claim and entered judgment on the counterclaim both against the plaintiff and against Madam Chun.

[4] Before us, the plaintiff relied on three grounds in support of its appeal. First, that the counterclaim was barred by *res judicata*. Second, that the remedy of specific performance was not available to the defendant. Third, that the learned judge had erred in not undertaking a judicial appreciation of the evidence led before him in consequence of which he misdirected himself. We will deal with each of these points in turn.

[5] To appreciate the argument raised on the plea of *res judicata*, it is necessary to narrate some of the factual background on which the plea is based. After the commencement of proceedings, the defendant took out a summons for an interlocutory mandatory injunction. Its application was based on an agreement dated 20 October 1991 between itself and a company called Jaytra Sdn Bhd. Under that agreement the defendant was given the right to extract sand from the subject property. At the date of that agreement Jaytra had been wound up. However, Madam Chun's husband, Wu Soo Hwa purported to act as the general manager of Jaytra. He appointed himself and Madam Chun as its directors. Tribute on the sand mined from the subject property was paid by the defendant to Madam Chun. All this was, of course, wholly illegal. The judge who heard the defendant's application for an injunction dismissed it. An appeal to this court failed. The judgment of this court is reported in [2000] 1 CLJ 181. It is clear from a reading of the judgments of Siti Norma Yaakob and Abu Mansor JJCA that the issue that was dealt with upon that occasion was the validity of the mining agreement which the defendant had with Jaytra. To illustrate the point we need do no more than quote the following sentence from the judgment of Siti Norma Yaakob JCA:

> I have already pointed out that no such right existed as it [the defendant] cannot derive any advantage or right under the first agreement [with Jaytra] which it has admitted is unenforceable.

[6] It is also pertinent to note that in an application for an interlocutory injunction; whether mandatory or prohibitory; the primary question for the court is whether the justice of the case warrants the grant of relief. See, *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293. It is upon that issue that this court made its pronouncement in its earlier decision. Learned counsel for the plaintiff drew our attention to certain passages in the judgment of Siti Norma Yaakob JCA in which the

merits of the case appear to have been discussed. The comments in these passages are mere *obiter dicta* and do not constitute the ratio of the case. It is only the ratio of the case which is binding between parties to a dispute or their successors. See, *Carl – Zeiss v. Rayner & Keeler* [1967] 1 AC 853. Further, to constitute *res judicata*, "the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 at p. 53, 'necessarily and with precision' determine the point in issue". See, *Tong Lee Hwa v. Lee Yoke San* [1979] 1 MLJ 24, per Chang Min Tat FJ. If you apply that test to the facts here, the decision of this court in the earlier case did not necessarily and with precision determine the point in issue in this appeal. The points at issue before the trial judge in the present instance were:

(i) whether the agreement of 10 June 1993 was a true sale and purchase agreement or a guarantee or security agreement to recover a loan made by the defendant to Airport Auto; and

(ii) whether Airport Auto had repaid the sum of RM282,000 to the defendant.

These issues were not at stake before this court in the earlier proceedings. It is therefore our judgment that the plea of *res judicata* cannot succeed.

[7] We now take the second argument on which the plaintiff's appeal is based. The question here is whether the defendant had abandoned its remedy of specific performance. The plaintiff says that it did and advances two reasons for this. In the first place, by reason of cl. 5 of the agreement of 10 June 1993, the defendant had opted for monetary compensation in lieu of specific performance. In the second place, the plaintiff was never a party or privy to the agreement of 10 June 1993. You cannot enforce an agreement against a non party. So the arguments go.

[8] Now, cl. 5 on which the plaintiff relies read as follows:

> In the event that the Vendor fails to complete the sale and purchase of the said property the Vendor shall refund the Deposit Sum to the Purchaser and such refund shall be guaranteed by Mr Wu Soo Hwa (NRIC No. 3395041) and this Agreement is deemed terminated and is null and void henceforth.

If this clause is to be given effect to, it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the defendant's claim for specific relief. It would mean that Airport Auto could rely on its own wrong to its advantage. Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim. In *Gimstern Corporation (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102, Wan Hamzah SCJ when delivering the judgment of the Supreme Court said:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, *vide* the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v. S.D.A.E.C.D France* [1919] AC 1.

So too here. Clause 5 is a stipulation that the sale and purchase agreement shall be void on a happening of an event which Airport Auto can by its own act or omission bring about. Hence, it cannot be permitted either to insist upon the clause or to compel the defendant who is blameless to insist upon it. To do so would be to permit Airport Auto to take advantage of its own wrong.

[9] The second ground upon which we would reject the argument based on cl. 5 is that the clause on its true construction does not amount to an abandonment by the defendant of its right to the remedy of specific performance. Indeed, there is nothing in the agreement of 10 June 1993 from which such an abandonment may be inferred. To succeed on a plea of abandonment it must be shown that the innocent party has either expressly or by necessary implication abandoned the remedy of specific performance. In the absence of an express abandonment cogent evidence is necessary to support a plea of implied abandonment. An example of an express abandonment is the case of *Ardeshir v. Sassoon* AIR [1928] Privy Council 208, where some nine months before the trial of the action the plaintiff's solicitor formally notified the defendant that the plaintiff had decided to abandon his claim for specific performance.

[10] As for the argument that the remedy of specific performance cannot be had against the plaintiff because it was not a party to the agreement in question, we consider this to be without merit for two reasons. First, there is a specific finding by the learned judge based on para 23 of Madam Chun's defence that at all material times the plaintiff was Madam Chun's nominee and that Airport Auto was her agent. The evidence on record fairly supports the inference that the transfer of the subject property by Madam Chun to the plaintiff was nothing more than an attempt to evade the contractual obligations that Airport Auto owed the defendant under the agreement dated 10 June 1993. The learned judge accordingly pierced the corporate veil of the plaintiff and Airport Auto. Based on established authority he was clearly entitled to do this.

[11] In *Jones v. Lipman* [1962] 1 All ER 442, the owner of a piece of land agreed to sell it to the plaintiffs. However, pending completion, he sold and transferred the land to the defendant company of which he and his solicitors' clerk were the only shareholders and directors. In an action by the plaintiff for a decree of specific performance it was argued that the defendant company being a separate and distinct entity was not amenable to the decree because it was a *bona fide* purchaser and not a party to the original agreement. However Russell J had no difficulty in repelling this argument on the ground that the company was a device and a sham, a mask used by the defendant to "avoid recognition by the eye of equity". Closer to home, in *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 at p. 537, Chong Siew Fai CJ (Sabah & Sarawak) said that:

> In cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligation or duties, the court would disregard the notional separateness of the companies.

So too here. Madam Chun by taking advantage of the transfer to the plaintiff was evading the contractual obligations she (in effect being the alter ego of Airport Auto) owed the defendant under the agreement of 10 June 1993. Accordingly there is no legal bar for the decree of specific performance being enforced against the plaintiff.

[12] There is a further reason advanced by the learned judge with which we agree for rejecting the arguments that the specific performance cannot be had against the plaintiff because it was not a party to the agreement in question. Clauses 20 and 21 of the agreement dated 10 June 1993 bind both Airport Auto and the plaintiff as its successor in title. These clauses read as follows:

> In this Agreement where the context so admits the term 'the Vendor' or 'the Purchaser' shall include their respective successor-in-title and permitted assigns and when there are two or more persons included in the term 'the Vendor' or 'the Purchaser' their liabilities under this agreement shall be joint and several. Words importing masculine gender shall be deemed and taken to include the feminine and neuter gender and the singular to include the plural and *vice versa.*

> This Agreement shall be binding upon the parties hereto their successor-in-title, permitted assign, heirs and personal representative respectively.

[13] There is a further point we must mention. It was suggested during argument that since the shareholders of the plaintiff company had changed since the events giving rise to the present litigation, it could not be held responsible for what the earlier shareholders had done. This argument is without merit because it overlooks the most fundamental of company law principles: that a company is separate and distinct entity from its shareholders. A change in the latter does not effect a change in the identity of the former. In *Abdul Aziz bin Atan & 87 Ors v. Ladang Rengo Malay Estates Sdn Bhd* [1985] 1 CLJ 255; [1985] CLJ (Rep) 370, all the shareholders of the defendant company in that case had sold their shares to a buyer. The company owned an estate in which the plaintiffs were employed. The question arose whether the sale of the shares had resulted in a sale of the estate. Shankar J said:

> It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The company from the date of incorporation has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited company is that the shareholders can have in their hands the management of the business without incurring the risk of being

> under unlimited liability for the debts of the company. Authority for this proposition should be found in any textbook on law relating to companies (but see *Halsbury's Laws of England*, 4th Edition Vol 7 paras 1, 82 and 100.)
>
> In the present case there was no change whatsoever in the constitution of *Ladang Rengo Malay Estate Sdn Bhd*. The company did not change its identity or personality …

[14] We now turn to the third submission made in support of the appeal. It has to do with the complaint that the judge did not judicially appreciate the evidence before him when adjudicating upon the issues in dispute. This is the sole ground on which submissions were advanced by learned counsel for Madam Chun although it must be said in fairness to him that he adopted the submissions made by learned counsel for the plaintiff on the other points already discussed earlier in this judgment. The two issues that were formulated for the judge to determine have already been adverted to earlier in this judgment. They are both fact sensitive. After a very careful scrutiny and analysis of the evidence the learned judge came to the conclusion that the agreement of 10 June 1993 was a genuine sale and purchase agreement and not a guarantee or security agreement to recover a loan made by the defendant to Airport Auto and that the latter had not repaid the sum of RM282,000 to the defendant.

[15] We have been taken through the evidence both by learned counsel for the plaintiff and Madam Chun in an effort to demonstrate that the learned judge had not sufficiently appreciated or evaluated it. We have very carefully examined the complaints made and subjected the learned judge's evaluation of the evidence to critical examination. Having done so we are satisfied that he did not misdirect himself upon any material particular. He disbelieved, as he was entitled to do, the testimony of the witnesses called by the plaintiff and Madam Chun. What then is our function as a Court of Appeal in a case such as this? We think that the answer has been provided by Lord Shaw of Dunfermline in his speech in *Clarke v. Edinburgh & District Tramways Co* [1919] SC 35 (HL) at p 36, where his lordship says:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanor, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sits here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[16] Adopting the approach in the above quoted passage, it is our duty to defer to the finding of fact made by the learned judge on the issues presented to him for decision.

[17] For the reasons already given, both appeals before us are dismissed. The orders made by the High Court are affirmed. The appellant in each appeal must pay the costs thereof to the respondent who shall be entitled to present a bill of costs against each appellant with a separate entitlement to getting up against each of them. The deposit in each appeal shall be paid out to the respondent to account of its taxed costs.